

# There is a way to expropriate while protecting property rights

● *Experts argue country must look beyond hysteria, scare-mongering*

Carol Paton

Land and expropriation without compensation is not a Gordian knot. It can be unraveled. In the past few days, as the ANC and the EFF joined forces to agree to amend the Constitution, panic has surged through the country, with the end of food production, capitalism and the world as we know it being predicted.

But it is possible for expropriation without compensation to co-exist with property and ownership rights. This is how.

At issue is section 25 of the Constitution. Section 25 (2) says: "Property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest; (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided to by those affected or decided or approved by a court."

In section 25(3) the criteria for compensation are set out: "The amount of the compensation ... must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including – (a) the current use of the property; (b) the history of acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation."

The definition of "just and equitable" is so generous that it is possible, and has been so since 1996, that in certain circumstances it would be just and equitable for the compensation award to be zero. Had such cases been brought before the

courts, which they have not, there would by now be a tested interpretation of the "just and equitable" principle, says Adv Geoff Budlender, the first director-general of the Department of Land Affairs after 1994.

We would also have, by now, says Budlender, "a clear indication from the Constitutional Court that willing buyer, willing seller is not the standard required by the Constitution. Willing buyer, willing seller means market value, which is only one of the considerations the Constitution says must be taken into account in deciding what is just and equitable."

But that has not been the route that events have followed, primarily because the state has hardly used expropriation at all and where it has, has tended to pay the market value for land, even as section 25(3) states is not the only criterion by which to determine compensation.

**SO EVEN WHEN THE STATE HAS NOT HAD TO PAY MARKET VALUE, IT HAS GONE AND DONE SO**

A wonderful example of this, says Adv Tembeka Ngcukaitobi, was the decision in 2013 to pay the Rattray family the market value for Mala Mala game reserve – R1bn. The Land Claims Court said it was not less than R791m and might be more.

"So even when the state has not had to pay market value, it has gone ahead and paid it," says Ngcukaitobi, author of the book *The Land is Ours*.

He agrees that expropriation without compensation can easily be done under the present constitutional provisions, but as

- Extract from motion amended by the ANC
- (7) Notes that in his State of the Nation Address, President Cyril Ramaphosa, in recognizing the original sin of land dispossession, made a commitment that Government would continue the land reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the State, implemented in a manner that increase agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities of the governing party resolution
  - (8) Further notes that any amendment to the Constitution to allow for land expropriation without compensation must go through a parliamentary process as Parliament is the only institution that can amend the Constitution; and
  - (9) Establishes an ad hoc committee, in terms of Rule 253, and with the concurrence of the National Council of Provinces instructs the Constitution Review Committee to:
    - (a) review and amend Section 25 of the Constitution review section 25 of the Constitution and other clauses where necessary to make it possible for the state to expropriate land without compensation, and in the process conduct public hearings to get the views of the ordinary South Africans, policy makers, civil society organisations and academics, about the necessity of, and mechanisms for expropriating land without compensation;
    - (b) propose the necessary constitutional amendments where applicable with regards to the kind of future land tenure regime needed;
    - (c) report to the Assembly by no later than 30 August 2018

Full version of the motion is available online at [www.businesslive.co.za](http://www.businesslive.co.za)

time has marched on and a clamour has grown around the land issue, it makes sense now to amend the Constitution and the Expropriation Act to clarify the criteria for compensation and make them explicit.

"If the point of the amendment is to provide the government with an explicit provision around compensation it can be easily done," Ngcukaitobi adds.

"A constitutional amendment to section 25 to say that, in cer-

tain instances, it would be just and equitable to expropriate without compensation would take care of that. Those circumstances could then be defined in legislation."

A new Expropriation Act has been stuck in the works since 2008 as lobbying and objections have seen it shuffling between Parliament and the Department of Public Works. After being finally passed in 2016, it was referred back to Parliament by

former president Jacob Zuma and has not emerged since.

Budlender sees a similar solution. As it is not difficult to think of situations where a strong case can be made for no compensation to be paid, the debate right now has been misguided. But nonetheless, the Constitution could be amended to make it explicit that "just and equitable can include no compensation in an appropriate case. And the criteria in section



**Productive land:** Food production will not be affected as long as the government implements a plan that increases yields. /Reuters

25(b) can be tilted in a direction that would make this outcome more likely," he says.

Legislation could put flesh on exactly the circumstances for which zero compensation could apply. Done like this, property and ownership rights would remain intact.

If the Constitution was amended to say that whenever the state expropriates land there should be no compensation, then the constitutional protection of ownership rights would cease to exist, says Budlender.

In its rush to reassure the public and markets that its approval of expropriation without compensation would not be, in President Cyril Ramaphosa's

words "a smash and grab", the ANC attached some caveats to its conference resolution and the resolution passed in the National Assembly: that expropriation will be "implemented in a manner that increases agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid".

But, says Ngcukaitobi, none of these, except the last – which refers to correcting the historical injustice of land dispossession – could really be applicable in law. Land will need be to restituted and restored on the basis of the criteria in the Constitution and the law. It would be impossible

to include subjective criteria.

"In the restitution framework you cannot ask if the land is productive, because that is moving away from the principle of historical restitution," he says. "Whether food production is affected is a question you can only ask afterwards, when you decide what to do with land."

When Parliament's Constitution Review Committee meets to discuss the modalities of the expropriation of land without compensation, this is the ground it will need to traverse.

Instead of the hysteria and scare-mongering of the past few days, it is a process that could result in a profitable outcome.

[patonc@bdlive.co.za](mailto:patonc@bdlive.co.za)